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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

10 JOHN E. BARNHOUSE,

11 Plaintiff,

12 v.

13 HAROLD CLARK, et al.,

14 Defendants.

No. C09-5527 RBL/KLS

ORDER DENYING MOTION FOR THE  
APPOINTMENT OF COUNSEL

15 This civil rights action has been referred to United States Magistrate Judge Karen L.  
16 Strombom pursuant to Title 28 U.S.C. § 636(b)(1) and Local MJR 3 and 4. Before the Court are  
17 Plaintiff's motions for the appointment of counsel. Dkt. 8, 10 and 17. Having carefully  
18 reviewed Plaintiff's motions and balance of the record, the Court finds, for the reasons stated  
19 below, that Plaintiff's motions should be denied.

20 **I. DISCUSSION**

21 No constitutional right exists to appointed counsel in a § 1983 action. *Storseth v.*  
22 *Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981). *See also United States v. \$292,888.04 in U.S.*  
23 *Currency*, 54 F.3d 564, 569 (9th Cir. 1995) ("[a]ppointment of counsel under this section is  
24 discretionary, not mandatory.") However, in "exceptional circumstances," a district court may  
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1 appoint counsel for indigent civil litigants pursuant to 28 U.S.C. § 1915(e)(1) (formerly 28  
2 U.S.C. § 1915(d)). *Rand v. Roland*, 113 F.3d 1520, 1525 (9th Cir. 1997), *overruled on other*  
3 *grounds*, 154 F.3d 952 (9th Cir. 1998) (emphasis supplied.) To decide whether exceptional  
4 circumstances exist, the court must evaluate both “the likelihood of success on the merits [and]  
5 the ability of the petitioner to articulate his claims *pro se* in light of the complexity of the legal  
6 issues involved.” *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986) (quoting  
7 *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983)). A plaintiff must plead facts that show he  
8 has an insufficient grasp of his case or the legal issue involved and an inadequate ability to  
9 articulate the factual basis of his claim. *Agyeman v. Corrections Corp. of America*, 390 F.3d  
10 1101, 1103 (9<sup>th</sup> Cir. 2004).

12 That a *pro se* litigant may be better served with the assistance of counsel is not the test.  
13 *Rand*, 113 F.3d at 1525. Moreover, the need for discovery does not necessarily qualify the issues  
14 involved as “complex.” *Wilborn*, 789 F.2d at 1331. Most actions require development of further  
15 facts during litigation. But, if all that was required to establish the complexity of the relevant  
16 issues was a demonstration of the need for development of further facts, then practically all cases  
17 would involve complex legal issues. *Id.*

19 Plaintiff states that he should be appointed counsel because he is unable to afford  
20 counsel, his imprisonment will greatly limit his ability to litigate, the issues are complex, he has  
21 limited access to the law library and counsel would be better equipped to present evidence and  
22 cross-examine witnesses. Dkt. 8, pp. 1-2. His second motion for counsel is a duplication of his  
23 first motion. Dkt. 9. In his third motion for counsel, Plaintiff again states the same grounds for  
24 the appointment of counsel, but attaches a memorandum in support. Dkt. 17, pp. 3-15. Here,  
25 Plaintiff argues that his claim has merit because the incident was previously “expunged” in the  
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1 Court of Appeals and because his exhibits prove beyond doubt that there was an Eighth  
2 Amendment violation. See e.g., *id.*, pp. 3-4. Mr. Barnhouse also seeks a preliminary injunction,  
3 stating that without an injunction “injury, loss or damage will result” from the “ongoing violation  
4 of Mr. Barnhouse’s constitutional rights.” *Id.*, pp. 11-12. Mr. Barnhouse bases his request for a  
5 preliminary injunction on the fact that defendants used excessive force and failed to file a report.  
6 *Id.*  
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8 To the extent Plaintiff seeks a preliminary injunction, he is advised that the Court will not  
9 entertain such a motion at this time as the named defendants have not been served with the  
10 complaint<sup>1</sup> and Plaintiff has not served defendants with his motion for preliminary injunction.  
11 Plaintiff is advised that, pursuant to Federal Rule of Civil Procedure 65(a)(1), no preliminary  
12 injunction can be issued without notice to the opposing party.  
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14 A temporary restraining order may be granted under Rule 65(b), but only if:

- 15 1) it clearly appears from specific facts shown by affidavit or by the verified  
16 complaint that immediate and irreparable injury, loss or damage will result  
17 to the applicant before the adverse party or that party’s attorney can be  
18 heard in opposition, and  
19 2) the [applicant] certifies to the court in writing the efforts, if any, which  
20 have been made to give the notice and the reasons supporting the claim  
21 that notice should not be required.

22 Fed. R. Civ. P. 65(b).

23 After defendants have been properly served with the complaint and have appeared in this  
24 action, by filing a notice and serving it on the Defendants or their counsel, Plaintiff may file a  
25 motion and note it on the Court’s calendar for the third Friday after filing and service of the  
26 motion.

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<sup>1</sup> By separate order, Plaintiff was directed to provide service copies of his complaint so that service by the Marshal Service may be commenced.

1 With regard to Plaintiff's request for counsel, his indigency, inability to obtain counsel  
2 and lack of legal skills are not exceptional circumstances which warrant the appointment of  
3 counsel. Plaintiff has demonstrated an adequate ability to articulate his claims *pro se*. Plaintiff  
4 has not demonstrated that the issues involved in this case are complex or that he has had any  
5 difficulties in expressing them. Plaintiff has also not shown a likelihood of success on the merits  
6 beyond his conclusory allegations that his case has merit. There is no evidence to support  
7 Plaintiff's assertion that the "same incident" was "expunged" by the Washington Court of  
8 Appeals and/or that such "expungement" supports a finding of Eighth Amendment violations.  
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10 Accordingly, Plaintiff's motions to appoint counsel (Dkts. 8, 10 and 17) are **DENIED**.  
11 The Clerk is directed to send copies of this Order to Plaintiff.

12 DATED at Tacoma, Washington this 9th day of October, 2009.

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16 Karen L. Strombom  
17 United States Magistrate Judge  
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